

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
24 HOUR GROCERY & CANDY, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1983 :
through November 30, 1986. :

In the Matter of the Petition :
of :
MOHAMED HAGAZI :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1984 :
through November 30, 1986. :

DETERMINATION

In the Matter of the Petition :
of :
MOHAMED NASER :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1984 :
through November 30, 1986. :

Petitioner 24 Hour Grocery & Candy, Inc., 5511 Fifth Avenue, Brooklyn, New York 11220, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through November 30, 1986 (File No. 806328).

Petitioner Mohamed Hagazi, 1689 66th Street, Brooklyn, New York 11214, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through November 30, 1986 (File No. 806326).

Petitioner Mohamed Naser, 1689 66th Street, Brooklyn, New York 11214, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through November 30, 1986 (File No. 806327).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 1, 1990 at 9:15 A.M., with all briefs and additional evidence to be submitted by May 17, 1990. Petitioners appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

- I. Whether an audit based on an average ratio of taxable sales to gross sales is permissible when the taxpayer maintains a day book.
- II. Whether petitioner 24 Hour Grocery & Candy, Inc. correctly reported its sales taxes and whether an audit in the circumstances described was justified.

FINDINGS OF FACT

(a) Petitioner 24 Hour Grocery & Candy, Inc. ("the corporation") operated a retail grocery store at 5511 5th Avenue, Brooklyn, New York. It sold food, newspapers and Lotto tickets, all of which are not taxable, and beer, soft drinks, candy and cigarettes, all of which are taxable items.

(b) Petitioner Mohamed Hagazi was president of the corporation. Petitioner Mohamed Naser was its secretary. Mr. Hagazi and Mr. Naser do not contest that they are responsible for the payment of the corporation's sales tax.

(c) The business had been purchased in December 1983. A notice of bulk purchase was filed with the Division of Taxation reporting the price of furniture and fixtures as \$1,000.00.

(d) For the period under audit, the corporation reported gross sales of \$103,917.00 and taxable sales of \$42,008.00.

(a) The corporation had a cash register but it did not use tapes in the register. There is

no evidence that it gave sales invoices to its customers.

(b) The corporation kept a listing of its daily sales. This was characterized without contradiction as a "day book".

(c) Records produced by the corporation for the auditor included a sales journal, cash receipts journal, as well as a purchases journal and some purchase invoices.

(d) Invoices, whether sales invoices or purchase invoices is not clear, were produced for the auditor on January 29, 1987 at Mr. Hagazi's home for 1985 and 1986 but not for 1984. Also on January 29, 1987, Mr. Hagazi exhibited daily listings of his sales which were prepared by Mr. Hagazi and Mr. Naser and given to their accountant. The sales listing was not accepted by the auditor for the reason that the figures were not supported in his opinion by sales invoices, cash register tapes or any other record for the whole audit period.

(a) The Federal corporation income tax returns of the corporation showed gross receipts (line 1c) of \$137,651.00 for 1984, \$243,441.00 for 1985 and \$140,977.00 for 1986. (These total \$522,069.00.)

(b) Each return also showed depreciable assets of \$28,950.00 and a cost basis for depreciation of the same amount.

(c) The auditor computed the gross sales for the 12 quarters under audit from the 1984 Federal income tax return and from the cash receipts journal. These gross sales came to \$515,080.00.

The auditor calculated that taxable sales would be 40 percent of gross sales on the basis, as he testified, of the information from the "Robert Morris survey" that "gross sales of a grocery store in Brooklyn is 40 percent taxable."

The tax due was computed as follows: The gross sales were \$515,080.00 and taxable sales were 40 percent of gross sales, resulting in taxable sales of \$206,032.00. Petitioners reported taxable sales of \$42,008.00 and were assessed the difference of \$164,024.00. Purchases of fixed assets of \$28,950.00 were also found to be taxable. The total tax due on these amounts was \$18,607.42, which was reduced by the tax that was paid with the returns of

\$3,465.13, leaving a balance due of \$15,142.29.

The following notices of determination and demands for payment of sales and use taxes due were issued against 24 Hour Grocery & Candy, Inc.:

(a) on March 20, 1987 for the quarter ending February 29, 1984 for total tax due of \$2,679.27, plus penalty of \$803.79 under Tax Law § 1145 and interest of \$2,194.62, for a total amount due of \$5,677.63;

(b) on June 12, 1987 for the quarter ending May 31, 1984 for total tax due of \$1,063.64, plus penalty of \$265.91 under Tax Law § 1145 and interest of \$456.80, for a total amount due of \$1,786.35;

(c) on September 11, 1987 for the period beginning June 1, 1984 and ending November 30, 1986 for total tax due of \$11,399.38, plus penalty of \$2,836.19 under Tax Law § 1145 and interest of \$2,948.76, for a total amount due of \$17,189.33;

(d) on September 11, 1987 for the period beginning June 1, 1985 and ending November 3, 1986 for a penalty of \$565.33 under Tax Law § 1145(a)(1)(vi).

(a) Identical notices of determination were issued on September 11, 1987 to Mohamed Hagazi and to Mohamed Naser for the period beginning December 1, 1983 and ending November 30, 1986 for tax due of \$15,142.29, penalty of \$3,771.92 under Tax Law § 1145 and interest of \$4,839.85, for a total amount due of \$23,754.06. The notices stated that the liability was asserted under Tax Law §§ 1131(1) and 1133 for the taxes due from 24 Hour Grocery & Candy, Inc. The determination for the first two quarters has been withdrawn by the Division of Taxation since those quarters were beyond the period of limitations. As reduced, the total tax due is \$11,399.38 plus penalty and interest.

(b) On the same date and for the period June 1, 1985 through November 30, 1986, a notice of determination was issued to Mohamed Hagazi for a penalty of \$565.33 under Tax Law § 1145(a)(1)(vi). Although not shown at the hearing but acquiesced to by petitioners, an identical notice was issued to Mohamed Naser.

CONCLUSIONS OF LAW

A. The audit can not be permitted. An audit can not contradict a taxpayer's own books and records when those books and records are kept in accordance with the Commissioner's regulations (Matter of Chartair Inc. v. State Tax Commission, 65 AD2d 44). Those regulations permit a taxpayer to keep "a daily record of all cash and credit sales in a day book or similar book" (20 NYCRR 533.2[b][1]). While the Division of Taxation states that the "listings" of nontaxable and taxable sales produced by the corporation were self-serving and without supporting documents it nevertheless did not deny either at the hearing or in its brief that they were properly characterized by the corporation as a day book.

B. The audit cannot be accepted as valid. The critical element in this sales tax audit case is the ratio of taxable sales to gross sales (40%) used by the auditor to compute the tax (Finding of Fact "7"). That amount was stated to be taken from a "Robert Morris survey". That publication has not been produced for introduction into evidence or even for inspection by petitioner and the administrative law judge. It is impossible to determine how the figures were computed or their limitations. In particular, although the figure was stated to be for grocery stores in Brooklyn, there was no indication that the publication reports such data for Brooklyn and presumably the data is actually derived from national averages. For these reasons the figure of 40% is not acceptable. Without such figure, the computation is of course incomplete and the audit is based on a principle which is fundamentally erroneous and must be rejected (Matter of Roncone, State Tax Commission, March 11, 1986, TSB-H-86[86]S; see Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51).

C. The petitions of 24 Hour Grocery & Candy, Inc., Mohamed Hagazi and Mohamed Naser are granted and the notices of determination issued March 20, 1987, June 12, 1987 and September 11, 1987, are cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE